Supreme Court, U.S.
FILED
JAN 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-1038

In the Supreme Court of the United States

October Term, 1986

JAMES W. BAKER, et al.,

Appellants,

v.

CITY OF SANTA MONICA, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEAL, SECOND DISTRICT OF THE STATE OF CALIFORNIA

MOTION OF CITY OF SANTA MONICA, et al. TO DISMISS OR AFFIRM

JOEL M. LEVY
General Counsel
HADASSA K. GILBERT
Staff Attorney
1685 Main Street
Santa Monica, California 90401
Telephone: (213) 458-8781

Attorneys for Appellee
SANTA MONICA RENT CONTROL BOARD

ROBERT M. MYERS
City Attorney
1685 Main Street
Santa Monica, California 90401
Telephone: (213) 458-8336

*KARL M. MANHEIM
Loyola Law School
1441 West Olympic Boulevard
Los Angeles, California 90015
Telephone: (213) 736-1105

Attorneys for Appellee
CITY OF SANTA MONICA

*Counsel of Record

Westside Law Publishers Los Angeles, California (213) 477-0491

26 pp

QUESTION PRESENTED

Whether landlords who have never sought available administrative relief from a land use and rent control law, or judicial review of specific agency action, present a justiciable case in which to review and reverse long standing precedent in economic due process cases?

TOPICAL INDEX

Page

Statement Of The Case 2

Introduction 4

Argument

I

This Case Does Not Present A Justiciable Controversy 7

A. This Case Is Not Ripe For Adjudication 7

B. Appellants Ask For An Advisory Opinion 10

C. The Controversy Is Moot As To Regulation 4040 10

II

There Is No Important Federal Question 12

A. The Constitution Does Not Require Return On Value In Rent Control Cases 12

B. Appellants Have Not Demonstrated That The Santa Monica Law Is Consfiscatory 15

Conclusion 16

TABLE OF AUTHORITIES CITED

Cases Page

Agins v. City of Tiburon, 447 U.S. 255 (1980) 5, 7, 9, 10
Baker v. City of Santa Monica, Case No. B009771 11
Birkenfeld v. City of Berkeley, 17 Cal.3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976)..... 9, 13
Block v. Hirsch, 256 U.S. 135 (1921)..... 4, 14
Carson Mobilehome Park Owner's Ass'n v. City of Carson, 35 Cal.3d 184, 672 P.2d 1297, 197 Cal.Rptr. 284 (1983)..... 14
Cotati Alliance For Better Housing v. City of Cotati, 148 Cal.App.3d 280, 195 Cal.Rptr. 825 (1983)..... 15
Fisher v. City of Berkeley, 37 Cal.3d 644 P.2d 261, 209 Cal.Rptr. 682 (1984), *aff'd other grounds,* ___ U.S. ___, 106 S.Ct. 1045 (1986) 3, 4-5, 10, 14, 15
Florida Power Corp. v. Federal Communications Comm'n, 772 F.2d 1537 (11th Cir. 1985), *prob. juris. noted,* ___ U.S. ___, 54 U.S.L.W. 3793 (1986)..... 13
Helmsley v. Borough of Fort Lee, 78 N.J. 200, 394 A.2d 65 (1978)..... 14
Hodel v. Virginia Surface Min. & Recl. Assn., 452 U.S. 264 (1981)..... 9
MacDonald v. Yolo County, 477 U.S. ___, 106 S.Ct. 2561 (1986)..... 5, 7, 9, 10
Marshall House, Inc. v. Rent Control Board, 358 Mass. 686, 266 N.E.2d 876 (1971)..... 14
Nash v. City of Santa Monica, 37 Cal.3d 97, 688 P.2d 894, 207 Cal.Rptr. 285 (1984)..... 2, 13
Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)..... 5

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 7
Power Comm'n v. Hope Gas Co., 320 U.S. 591 (1943) 15
Troy Hills Village v. Parsippany-Troy Hills Township Council, 68 N.J. 604, 350 A.2d 34 (1975) 14
Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982) 9
Williamson County Planning Comm'n v. Hamilton Bank, 473 U.S. ___, 105 S.Ct. 3108 (1985) 5, 7
Zussman v. Rent Control Board, 371 Mass. 632, 359 N.E.2d 29 (1976) 14

Statutes

California Code of Civil Procedure
Section 1094.5 2
California Government Code
§ 1021.5 11
47 United States Code
§ 224 13

Constitutions

United States Constitution
Fifth Amendment 7
Fourteenth Amendment 7

Other Authorities

Santa Monica City Charter
Article XVIII 2, 3
§ 1803(g) 2
§ 1804 14
§ 1805 ..... 2, 14
§ 1805(b) 5
§ 1805(d) 8

§ 1805(d)(12) 6
§ 1811 8

Santa Monica Rent Control Board
Regulation 4039 6
Regulation 4040 ..... 2, 8, 11, 12
Regulation 4041 6
Regulation 4100 ..... 2, 8, 13, 15, 16
Regulation 4103 6
Regulation 4106 ..... 6, 14

Baar, Guidelines for Drafting Rent Control Laws: Lessons of a Decade, 35 Rutg. L.Rev. 723 (1983) 13, 14

No. 86-1038

In the Supreme Court of the United States

October Term, 1986

JAMES W. BAKER, et al.,

Appellants,

v.

CITY OF SANTA MONICA, et al.,

Appellees.

MOTION OF CITY OF SANTA MONICA, et al. TO DISMISS OR AFFIRM

Appellees City of Santa Monica and Santa Monica Rent Control Board move, pursuant to Supreme Court Rule 16, to dismiss the appeal filed herein by Appellants James W. Baker, John J. Stein, et al., for want of a substantial federal question or in the alternative, appellees move to affirm the judgment of the court below.

STATEMENT OF THE CASE

This is a taxpayer challenge to a comprehensive land use and rent control law. The law was enacted by a voter-sponsored initiative amending the Santa Monica City Charter on April 10, 1979.[1] This lawsuit was filed the following day. No appellant has at any time applied for administrative relief from the agency vested with such authority.[2] Nor has any appellant sought judicial relief under California's administrative review procedures.[3]

Appellants' claims in the lower courts challenged all aspects of the law, and sought declaratory and injunctive relief on state and federal constitutional grounds. Jurisdictional Statement (JS) 6. In this Court, appellants have apparently abandoned all claims except those relating to two agency regulations for determining allowable rent increases.[4] The first — Regulation 4040 —

[1]The amendment added Article XVIII to the Santa Monica City Charter. Appendix L to Jurisdictional Statement.

[2]The Santa Monica Rent Control Board (Board) is an agency of the City of Santa Monica (City), and is governed by an independently elected board of Commissioners. Both the Board and City, as well as individual Commissioners and members of the City Council, are named as defendants-appellees (App. K-1), and appear here by their respective counsel. The Board is authorized to hold administrative hearings (Charter Section 1805; App M-16-20) and promulgate regulations (Charter Section 1803(g); App. M-11). Regulations pertaining to rent increases are contained in Appendix P.

[3]Judicial review of agency actions is ordinarily obtained by a Writ of Administrative Mandamus under California Code of Civil Procedure Section 1094.5 (West, 1980).

[4]*See* Questions Presented, JS at i. A prior constitutional challenge to that portion of the law regulating uses was rejected by the California Supreme Court in *Nash v. City of Santa Monica*, 37 Cal.3d 97, 688 P.2d 894, 207 Cal.Rptr. 285 (1984). An appeal to this Court was dismissed for lack of a substantial federal question. 470 U.S. 1046 (1985).

was repealed in 1981, after a preliminary ruling by the trial court. App. E. That regulation was replaced by Regulation 4100 *et seq.*, which has been implemented continuously since that time.[5] In a second preliminary ruling, Regulation 4100 was facially upheld (App. G), although that ruling was later modified by the Judgment.

In its Judgment, the trial court ruled that landlords were entitled under the due process clause to rental income which provided a "just and reasonable return on the value of their property." App. K-5. It further ruled that "the value of the property should be interpreted as the fair market value of such property" as determined in eminent domain proceedings. App. K-4. The court held the law facially unconstitutional for failure to met this standard.

On appeal to the California Court of Appeal, the trial court's decision in "Phase II," upholding Regulation 4100, was affirmed. All other provisions of the trial court's Judgment were reversed on the ground that its "reliance upon the Fair Market Value standard . . . is seriously misplaced." App. A-9. The court held that all "precedents point in the opposite direction." App. A-20. The California Supreme Court denied review. App. B-9.

---

[5]The old regulation was based on a "return on investment" formula similar to the one approved in *Fisher v. City of Berkeley*, 37 Cal.3d 644, 681, 693 P.2d 261, 291, 209 Cal.Rptr. 682, 712 (1984), *aff'd on other grounds*, ___ U.S. ___, 106 S.Ct. 1045 (1986). The current regulation employs the commonly used Net Operating Income approach, which is cogently described by the trial court in its Statement of Intended Decision, Phase II. App. G-4-7.

City Charter Article XVIII was amended in 1984, authorizing the Board to implement Regulation 4100, and to otherwise conform the Charter and regulations to law. App. M-1-31.

INTRODUCTION

Appellants' press a constitutional theory that economic regulation, such as rent and price control, is valid only if the profits earned from regulated assets are commensurate with market-rate returns. The "constitutional test" urged in the lower courts and here is that diminution in profit, measured by the *rate of return* on the *market value* of property, would be confiscatory. Not only is their "much criticized return on value standard" (*Fisher v. City of Berkeley*, 37 Cal.3d 644, 681, 693 P.2d 261, 291, 209 Cal.Rptr. 682, 712 (1984), *aff'd other grounds*, ___ U.S. ___, 106 S.Ct. 1045 (1986)) unworkable in practical economic terms, it is contrary to economic regulation generally. The lower court's rejection of the "return on market value" theory is supported by virtually every court, including this one, considering the issue.

Thus, appellants must ask this Court to reconsider settled law, and reverse every rent control case going back to *Block v. Hirsch*, 256 U.S. 135, 157 (1921) (rent control law providing "reasonable rent" constitutional even if landlord deprived of profit) and the other "Rent Law" cases of the 1920s. They base their unusual request on the Court's purported failure to articulate constitutional standards during a century of rate regulation cases. Yet, their criticism of this and lower courts is misplaced.[6] Recently, this Court rejected a nearly identical challenge to Berkeley's rent control law. *Fisher*

[6]Appellants assert that "there has never been enunciated any basic framework" (Jurisdictional Statement (JS) at 13); "the decisions in this area are basically ad hoc, without consistent analysis and providing little or no guidance" (*id.*); "general guidelines . . . are only loosely established" (*id.*); "a review of judicial decisions involving agency rate setting determinations fails to yield any consistent analysis" (*id.* at 14); and "the courts have been groping for an appropriate standard" (*id.* at 18).

v. City of Berkeley, 471 U.S. 1114 (1985) (rent control question dismissed for lack of substantial federal question), *aff'd on other grounds,* ___ U.S. ___, 106 S.Ct. 1045 (1986)[7]

Because the law challenged in this case was tried below on a facial basis, without any appellant ever having sought administrative relief,[8] appellants must also ask this Court to abandon two principles which have governed the review of due process and takings cases for many years. The first is that such cases are "ad hoc, factual inquiries depending upon the particular circumstances of each case." *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124 (1978). The second is that the constitutionality of economic regulation can be analyzed only after the regulatory agency has taken action with respect to a particular case. *MacDonald v. Yolo County,* 477 U.S. ___, 106 S.Ct. 2561 (1986); *Williamson County Planning Comm'n v. Hamilton Bank,* 473 U.S. ___, 105 S.Ct. 3108 (1985); *Agins v. City of Tiburon,* 447 U.S. 255 (1980).

If appellants' complaint is that this rent control law "goes too far," it is incumbent upon them to demonstrate just that. Without ever seeking an individual rent increase[9] under the Board's speedy administrative

---

[7]The question dismissed by this Court was: "Does a rent control law which restricts landowners to a limited return on their original investment, without regard to the appreciated value of their property, constitute a taking under the fifth and fourteenth amendments?"

[8]*See* A-19.

[9]Appellants have undoubtedly availed themselves of the automatic annual rent increases granted on a city-wide basis. (City Charter Section 1805(b), App. M-16). Since 1979, these "general adjustments" have authorized self-executing rent increases of approximately 50%.

process,[10] appellants raced into court within hours of the law's passage, functionally claiming that rent control is *per se* unconstitutional. Unless that is the case, this action is not ripe for adjudication and fails to present a substantial federal question.

---

[10]Rent increases above and beyond the annual adjustment are awarded for a variety of factors including capital improvements (Reg. 4041), increases in operating expenses (Reg. 4106, App. P-6), and disproportionate rents (Reg. 4103, App. P-4-5).

The Board is required by law to act upon an application for rent increase within 120 days from the date it is filed. (Charter Section 1805(d)(12), App. M-20). If no action is taken in a timely manner, the application is automatically granted. Regulation 4039.

ARGUMENT

I

THIS CASE DOES NOT PRESENT A JUSTICIABLE CONTROVERSY

A. This Case Is Not Ripe For Adjudication

Appellants' resort to judicial review is premature. In recent years, this Court has often reiterated that "an essential prerequisite to [the] assertion [of a 'taking' claim] is a final and authoritative determination" by the administrative agency vested with regulatory authority. *MacDonald v. Yolo County*, ___ U.S. ___, 106 S.Ct 2561 (1986). Because constitutional analysis of an economic regulation depends on whether it "goes too far" (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)), it is essential to first determine what uses or relief is available to a property owner. No constitutional claim arises until those elements ripen. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) ("no concrete controversy" until administrative remedies are exhausted).

> [A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. ___, 105 S.Ct. 3108, 3117 (1985).

Moreover, the ripeness requirement applies "whether [the Court] examine[s] the . . . regulations under Fifth Amendment "taking jurisprudence, or under the precept of due process." *Id.* at 105 S.Ct. 3116.[11]

---

[11]Repealed Regulation 4040 had been ostensibly challenged on both Fifth Amendment "taking" and Fourteenth Amendment "due

Appellants admit "the trial on Regulation 4100 was a 'facial' rather than an 'as-applied' challenge." JS 7. But they seek to avoid the strictures of the foregoing cases by characterizing the challenged regulation as "explicit" and "leaving no room" for interpretation. *Id.* Appellants miss the point of the ripeness requirement. Application of the law could be preordained, fixed, and immutable (which it is not),[12] but without specific facts before the Court, it is impossible to assess appellants' claim that they have been deprived of property without due process.[13]

---

process" grounds, whereas the current law (Regulation 4100) was tried only under due process theories.

> "The parties have not tendered the issue as to whether imposition of the 4100 Regulations has constituted a 'taking of property' as of the date of this decision, and the court has not found that any 'taking' has occurred. In any individual administrative mandamus proceeding the question as to whether a 'taking' has occurred as to that particular property would be a matter for that court to determine. See *San Diego Gas & Electric Co. v. City of San Diego*, (1981) 101 S.Ct. 1287." Superior Court Statement of Decision, Phase II. App. G-8.

[12]If the law were as certain as appellants suggest, it would not contain provisions and procedures for individualized treatment of landlords based on individual circumstances. Nor would it contain a mechanism for administrative hearings (Section 1805(d), App. M-17), with appeal to the full Board (*Id.*) and judicial review (Section 1811, App. M-30). In any event, appellants have never contended that application for administrative relief is or would be futile.

[13]Appellants' reference to a "massive as-applied challenge" (JS 16) containing "all of the necessary ingredients" (JS 18) for adjudication, is directed to a law repealed over five years ago, and which appellees have no intention of resurrecting. There is no longer any "case or controversy" regarding Regulation 4040. *See* Section IC, *post*, p. 10. The only law before the Court (Regulation 4100) was tried immediately upon enactment. Thus, the parties' expert testimony was confined to computer modeling and economic

The salutary ripeness requirement is underscored by appellants' own argument that only the *results* of administrative action are relevant for constitutional purposes. JS 13 (emphasis in original). Yet, no results are known here; not only because appellants have entirely bypassed administrative relief, but also because it is unknown whether their properties have been put to alternative uses. "Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald,* 106 S.Ct. at 2567.[14]

Since the constitutional "question properly [turns] upon the particular circumstances of each case" (*MacDonald*, 106 S.Ct. at 2566), generalized facial challenges such as the instant case are disfavored. Where facial challenges are accepted by the Court, they are necessarily limited to whether the challenged law is unconstitutional *per se. Agins v. Tiburon,* 447 U.S. 255, 260 (1980) ("the only question properly before us is whether the mere enactment of the zoning ordinance constitutes a taking"); *Hodel v. Virginia Surface Min. & Recl. Assn.*, 452 U.S. 264, 295 (1981).

Finally, even if appellants could demonstrate on this record that rent control "confiscates" their property,

---

projections. Not a single live set of facts was presented. Accordingly, trial was limited to the facial inquiry established by the California Supreme Court, whether the administrative agency was incapable of avoiding confiscatory results. *Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

[14]In terms of justiciability, the instant ripeness problem demonstrates appellants' lack of standing. Their taxpayer status in state court is insufficient here. *Valley Forge Christian College v. Americans United,* 454 U.S. 464 (1982). They have not demonstrated an alternative "injury in fact," particularly since the record fails to reveal the particular status of any appellant's property.

their claim is still "premature" since they have failed "to avail [themselves] of an available and facially adequate state procedure by which [they] might obtain 'just compensation.' " *MacDonald,* 106 S.Ct. at 2567. In this case, appropriate compensation would be sought through state judicial review of agency rent determinations.

B. Appellants Ask for an Advisory Opinion

Without having a specific case to present, appellants are relegated to asking the court for advice and guidelines. JS 13. Appellants' goal may be laudable — to provide "guidance for the next litigant" (JS 13), "to assist the administrative agencies" (JS 15), and courts "groping for an appropriate standard" (JS 18). But the Court would be in no better position here in articulating a "precise rule" (*Agins v. Tiburon,* 447 U.S. at 260), than it has been in prior cases. Thus, the California Supreme Court is on firm ground in its refusal to accept appellants' invitation (JS 16) demanding instead "specific applications of various administrative standards" before announcing any "constitutional test." *Fisher v. City of Berkeley*, 37 Cal.3d at 681 n.35, 693 P.2d at 291 n.35, 209 Cal.Rptr. at 712 n.35.

C. The Controversy Is Moot as to Regulation 4040

There are no "specific applications" of relevant regulations in this case. In the initial phase of the trial, appellants introduced into evidence several administrative decisions supposedly indicative of agency practice. None of these "representative" cases involved appellants. No specific findings were made concerning these cases.[15]

---

[15]The only findings made by the trial court relative to the "massive as-applied challenge before it" (JS 16) concerned the "average" time required for a landlord to fill out an application (Finding

But, even if "Phase I" could be characterized as an as-applied challenge, there is no live controversy as to the regulation litigated there. Appellees' Regulation 4040 was repealed more than five years ago, albeit in reponse to the trial court's ruling. But appellees have no intent to reactivate that law. Thus, none of the allowed exceptions to the mootness doctrine are present.[16]

Moreover, this case was tried primarily on raw economic projections and theory, rather than concrete facts.[17] As such, the evidence is subject to the vagaries of economic conditions in Santa Monica and throughout the nation, which have changed dramatically since 1980, when trial commenced. Thus, in finding in Phase II that appellants had failed to meet their burden of proof regarding the economic consequences of rent control, the court stated:

---

of Fact 13, App. E-4) and the "average time for [agency] decision" (Finding of Fact 14, App. E-5). Findings relating to economic effects on individual properties involved only "hypothetical buildings" (Finding of Fact 24, App. E-6) and "average Santa Monica landlords" (Finding of Fact 39, App. E-10).

[16]Appellants do not contend that they continue to be aggrieved by Regulation 4040. Their complaint sought prospective relief only, which they obtained by invalidation and repeal of the old regulations. Their only possible interest in relitigating a dead law is a claim for attorneys fees based on California Government Code Section 1021.5. That claim is pending before the California Court of Appeal in a separate action. *Baker v. City of Santa Monica*, Case No. B009771. The attorneys fee claim is based entirely on state law and presents no federal question.

[17]Appellants characterize the evidence as "a detailed survey and regression analysis . . . computer assisted analysis . . . and numerous actual decisions by the Board implementing Regulation 4040." JS 6. The "actual decisions" did not involve appellants, were mostly for illustrative purposes, and formed no part of the trial court's Findings of Fact or Judgment. See fn. 15, supra.

> [The] elaborate and well-presented economic mathematical calculations using various assumptions . . . can be validated for the past, where we may have concrete evidence. . . . But after several years, the assumptions and expectations of necessity become more attenuated, more speculative. We do not know what the future has in store with reference to these variable factors. App. F-11-12.

What the trial court recognized as "this dilemma of the economic experts" (*id.*) on February 17, 1982 when its decision was issued is doubly true five years later.[18] Thus, the evidence adduced at trial, as well as the law itself (Regulation 4040), are both moot.

II

THERE IS NO IMPORTANT FEDERAL QUESTION

A. The Constitution Does Not Require Return On Value In Rent Control Cases

Appellants offer this case as an appropriate vehicle to reconsider this Court's rate setting precedent to "ensure that the returns allowed by administrative rate setting agencies are not unconstitutionally confiscatory." JS i.[19] Whatever the merit of their proposed "fair market

---

[18]The court was remarkably prescient regarding the volatility of the economic projections used at trial. "Is it surprising that in these days of interest rates fluctuating substantially, and the rate of inflation undergoing similar fluctuations, it is much more difficult for appraisers, economists, lawyers, constitutional scholars and the courts to arrive at a precise standard?" App. F-11.

[19]Even if viewed as a rate case, it is not at all clear how the ripeness requirement disappears, or how the question "what rates can be charged," differs from "what development will be permitted?" In either case, the question is entirely speculative without prior agency action.

footnote continued

value" standard is in the ordinary rate regulation context, it is entirely out of place in land use and rent control cases.

Appellants attempt to cast this case in the mold of rate regulation, seeking thereby to distinguish adverse zoning and land use cases. Admittedly, rent control is a hybrid, having salient characteristics of both price and land use regulations.[20] But, the law before the Court differs substantially from ordinary price regulation systems.[21] Regulation 4100 sets limits on rent *increases*, not rents themselves.[22] Thus, the regulation "stabilizes,"

---

cont.

Appellants' reliance on *Florida Power Corp. v. Federal Communications Comm'n*, 772 F.2d 1537 (11th Cir. 1985), *prob. juris. noted*, ___ U.S. ___, 54 U.S.L.W. 3793 (1986), is of no help to them. Just as in this case, the relevant legislation in *Florida Power* authorized the supervising agency (FCC) to determine individual rates. But, unlike this case, the utility did not mount a facial challenge to the Pole Attachments Act (47 U.S.C. § 224), or the FCC's regulations themselves. Rather, after specific action by the agency, "Florida Power filed an application for review by the FCC pursuant to" agency regulations. *Id.* at 1541. After denial, it then petitioned the court of appeals "for review of the FCC's Order." *Id.* at 1542.

[20]Rent control is not simply rate setting. Typically, such laws regulate uses, evictions, conversions, demolitions, habitability, and aspects of the landlord-tenant relationship. *See* Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 Rutg. L.Rev. 723 (1983). Thus, the trial court found rate setting and zoning doctrines each inadequate by themselves. App. D-10-13; E-9-12.The California Supreme Court has relied on land use and price control cases in reviewing rent control laws (*Birkenfeld v. City of Berkeley*, 17 Cal.3d at 159, 550 P.2d at 1023, 130 Cal.Rptr. at 487 (1976)), but has found neither entirely satisfactory (*Nash v. City of Santa Monica*, 37 Cal.3d at 99-100, 688 P.2d at 896, 207 Cal.Rptr. at 287 (1984)).

[21]There is a "conceptual and practical . . . difference between the rent setting process and pricing in other types of industries." Baar, *supra*, note 20, at 732.

[22]The actual rent ceiling for any particular apartment is a

rather than "sets" rents. Moreover, this Court observed long ago that rent control is not all that analytically far from zoning. *Block v. Hirsh*, 256 U.S. 135, 156 (1921) ("if to answer one need the legislatuare may limit height to answer another it may limit rent").

The Santa Monica law follows the "Net Operating Income" (NOI) approach to rent control, generally favored by courts and commentators. *See* Baar, *supra*, note 20, at 810 (NOI standards are the "best available"); trial court decision Phase II (App.G-7) (NOI method possesses all the characteristics "a rent control plan should have"). In addition to being favored, rent control laws similar to Santa Monica's have been frequently approved. *Fisher v. City of Berkeley*, 37 Cal.3d at 681, 693 P.2d at 291, 209 Cal.Rptr. at 712, *aff'd on other grounds*, __U.S. __, 106 S.Ct. 1045 (1986); *Carson Mobilehome Park Owner's Ass'n v. City of Carson*, 35 Cal.3d 184, 672 P.2d 1297, 197 Cal.Rptr. 284 (1983); *Helmsley v. Borough of Fort Lee,* 78 N.J. 200, 394 A.2d 65 (1978); *Zussman v. Rent Control Board,* 371 Mass. 632, 359 N.E.2d 29 (1976); *Troy Hills Village v. Parsippany-Troy Hills Township Council*, 68 N.J. 604, 350 A.2d 34 (1975); *Marshall House, Inc. v. Rent Control Board,* 358 Mass. 686, 266 N.E.2d 876 (1971).

Conversely, the approach pressed by appellants is "much criticised." *Fisher v. City of Berkeley,* 37 Cal.3d at 681, 693 P.2d at 291, 209 Cal.Rptr. at 712.

---

combination of that unit's "base rent" plus subsequent rent increases. Charter Sections 1804, 1805. App. M-15-23. Base rent is equal to actual 1978 rent. Thus, each unit's base was set by the landlord in an unregulated market prior to enactment of rent control. Subsequent rent increases are set by the Board according to a formula, and take into account increases in operating expenses and inflationary erosion of landlord profit. Rent increases are partially tied to increases in the Consumer Price Index. Regulation 4106.

> The fatal flaw in the return on value standard is that income property most commonly is valued through capitalization of its income. Thus, the process of making individual rent adjustments on the basis of a return on value standard is meaningless because it is inevitably circular: value is determined by rental income, the amount of which is in turn set according to value. Use of a return on value standard would thoroughly undermine rent control, since the use of uncontrolled income potential to determine value would result in the same rents as those which would be charged in the absence of regulation. . . . Rent control utilizing this standard is no rent control at all. *Cotati Alliance For Better Housing v. City of Cotati*, 148 Cal.App.3d 280, 287, 195 Cal.Rptr. 825, 829-830 (1983).

See Power Comm'n v. Hope Gas Co., 320 U.S. 591, 601-02 (1943) ("rates cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings upon whatever rates may be anticipated"). Appellants offer no reason why this Court should reexamine the consensus view of return on value standards, especially since an identical challenge was so recently rejected in *Fisher*.

B. Appellants Have Not Demonstrated That The Santa Monica Law Is Consfiscatory

The only "fact" that appellants have advanced in support of their appeal is that, based on their computational projections for a hypothetical landlord, Regulation 4100 would yield a return on market value between two and six percent based on cash income alone.

JS 8.[23] However, cash "throwoff" is but one component of a property owner's overall return, as appellants concede (JS H-5-6, I-4), and a poor indicator of profitability. [24] When all components of "return" under Regulation 4100 are considered, the rate of return is significantly higher.[25]

The testimony of the parties' experts varied greatly because they employed so many different assumptions and variables (App. G-10) in an effort to "predict long term results" (App. G-14). Their task was impeded by the lack of definite data relating to specific properties. The uncertainty and divergence in the testimony caused the trial court to quote David Stockman, former Director of the Budget: "None of us really understands what's going on with all these numbers." App. G-11. Thus, the only thing clear from the record is that appellants failed to establish their case.

CONCLUSION

Long established precedent supports the decision of the lower court. The record does not warrant a departure from, or abandonment of, such precedent. Accordingly, appellees respectfully request that their Motion To

---

[23]Appellees' experts calculated significantly higher values. *See* App. G-12.

[24]The other "return on market value" figures in the Jurisdictional Statement (e.g., JS 4) are also based entirely on cash throwoff, and fail to consider appreciation, tax benefits, and the like. These other factors are especially critical in Santa Monica because of the exceptionally high value of underlying land. *See* App. G-12.

[25]The testimony showed that "residential income property values have not dropped in Santa Monica following the establishment of rent control," as "might [otherwise] be expected." App. G-12.

Dismiss be granted, or in the alternative, that the Court affirm the judgment of the court below.

Respectfully submitted,

ROBERT M. MYERS
City Attorney

*KARL M. MANHEIM
Loyola Law School

JOEL LEVY
General Counsel
HADASSA GILBERT
Staff Attorney

Attorneys for Appellees

**Counsel of Record*

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on January 16, 1987, I served the within *Motion To Dismiss* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Clerk, California Supreme
Court
3580 Wilshire Boulevard
Room 213
Los Angeles, California 90010

Clerk, California Superior
Court
Honorable Richard A. Lavine
111 North Hill Street
Los Angeles, California 90012

Clerk, California Superior
Court
Honorable Thomas T.
Johnston
111 North Hill Street
Los Angeles, California 90012

Ron Rouda, Esq.
1337 Santa Monica Mall
Suite 207
Santa Monica, California 90401

Stephen L. Jones
725 South Figueroa Street
Suite 1200
Los Angeles,
California 90017-2513

Clerk, California Court
of Appeal
Second Appellate District
Division Three
3580 Wilshire Boulevard
Room 301
Los Angeles, California 90010

George Kimball
Latham & Watkins
555 South Flower Street
Los Angeles, California 90071

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 16, 1987, at Los Angeles, California.

Sharon L. Stewart
(Original signed)